

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE

FILED: 03/29/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

GARY COMELLA,) 1 CA-IC 10-0030
)
Petitioner,) DEPARTMENT A
)
v.)
)
THE INDUSTRIAL COMMISSION OF)
ARIZONA,) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Respondent,)
)
PRODUCE MARKET/REYES PRODUCE,)
)
)
Respondent Employer,)
)
SCF ARIZONA,)
)
Respondent Carrier.)
_____)

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules of
Civil Appellate Procedure)

Special Action-Industrial Commission

ICA Claim No. 20043-490269

Carrier Claim No. 0447167

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

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T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) findings and award permanently suspending petitioner employee's (Comella's) benefits. For the following reasons, we affirm the findings.

I. FACTS AND PROCEDURAL HISTORY

¶2 Comella sustained an industrial injury in November 2004. In January 2007, the ICA issued a findings and award for unscheduled permanent partial disability, indicating Comella had a 10% general physical functional disability and had sustained a 60.96% reduction in earning capacity, entitling him to \$804.65 per month in permanent benefits.

¶3 On November 27, 2007, Comella was convicted of a class 6 felony for making false statements to obtain compensation between January 2006 and September 2006, while the claim was open for temporary compensation benefits. The ICA issued a notice of suspension of benefits on November 28, 2007, permanently suspending Comella's benefits as a result of the conviction, in accordance with Arizona Revised Statute (A.R.S.) § 23-1028(A). The notice advised Comella that if he did not agree with the suspension, he could request a hearing within ninety days of the date of mailing. Comella did not protest the notice of suspension and consequently, the notice became final.

¶4 In October 2009, Comella filed a motion for investigation under A.R.S. § 23-1061(J), alleging respondent carrier had failed to pay monthly benefits. The administrative law judge (ALJ)

allowed the parties to file legal memoranda in lieu of a hearing. In Comella's memorandum, he cited at length to *Obregon v. Industrial Commission*, 217 Ariz. 612, 177 P.3d 873 (App. 2008), an opinion issued by this court several days after Comella's suspension of benefits became final. In *Obregon*, we interpreted A.R.S. § 23-1028(A) to mean that a claimant convicted of making false statements to receive benefits forfeits only the benefits obtained as a result of the fraud, not all benefits. *Obregon*, 217 Ariz. at 616, ¶ 24, 177 P.3d at 877. Comella then argued that the pertinent question for the ALJ was "whether *Obregon* applies retroactively to the present case." Respondents carrier and employer argued that because Comella failed to protest the notice of suspension, the ALJ lacked jurisdiction to proceed.

¶15 The ALJ concluded that the November 28, 2007 notice of suspension of benefits became final without protest and ordered Comella's benefits to be permanently suspended. Comella filed a timely request for review, and the ALJ entered a decision upon review affirming the findings and award. Comella next brought this special action. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(2) (2003), 23-951(A)(1995), and Rule 10 of the Arizona Rules of Procedure for Special Actions.

II. DISCUSSION

¶16 In reviewing findings and awards of the ICA, we consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640,

643 (App. 2002). We review de novo questions requiring the interpretation of law. See, e.g., *Ariz. Dept. of Pub. Safety v. Indus. Comm'n*, 170 Ariz. 275, 823 P.2d 1283 (App. 1991).

¶7 Comella argues that the ICA should have applied *Obregon* retroactively and that the ALJ abused his discretion by depriving Comella of his unscheduled permanent partial disability benefits. Comella did not contest the suspension of benefits until 2009, and did so by filing a motion for investigation pursuant to A.R.S. § 23-1061(J) (2011), which provides, in relevant part:

The commission shall investigate and review any claim in which it appears to the commission that the claimant has not been granted **the benefits to which such claimant is entitled**. If the commission determines that payment or denial of compensation is improper in any way, it shall hold a hearing pursuant to § 23-941 within 60 days after receiving notice of such impropriety.

Id. (Emphasis added).

¶8 The purpose of this statute is "not to permit collateral attacks on the findings, orders or awards" of the ICA, but rather to charge the ICA "with the duty of investigating and reviewing claims" to ensure that "carriers are paying the benefits to which the claimants are entitled." *Massie v. Indus. Comm'n*, 113 Ariz. 101, 104, 546 P.2d 1132, 1135 (1976). Comella failed to timely protest the November 28, 2007 notice of suspension by requesting a hearing within ninety days. Comella is not entitled to benefits and therefore, A.R.S. § 23-1061(J) does not apply, nor is it a proper method by which to challenge the notice of suspension.

¶9 Comella further argues that the ALJ's permanent suspension of his benefits "penalized" Comella for "failing to pursue what, at the time, would have been a frivolous claim, since it was only *after* this Court's opinion in *Obregon* was issued that [Comella] had legal authority supporting [his position]" that only the benefits obtained as a result of the fraud should have been suspended.

¶10 We disagree. *Obregon* did not overrule clear and reliable precedent or pronounce a new rule of law previously unavailable to litigants. Rather, we "engaged in ordinary statutory interpretation" to hold that as an issue of first impression, a claimant does not forfeit all future workers' compensation benefits, but only those benefits that were obtained by his fraudulent conduct. *Obregon*, 217 Ariz. at 617, n. 4, ¶ 24, 177 P.3d at 878, n.4.

¶11 Furthermore, in *Jardanowski v. Indus. Comm'n*, 197 Ariz. 246, 3 P.3d 1166 (App. 2000), we described the history of § 23-1028 and ultimately concluded that the statute was inapplicable in that case. 197 Ariz. at 248-251, ¶¶ 12-30, P.3d at 1168-1171. However, we specifically stated that "[g]iven this disposition, we need not decide whether A.R.S. § 23-1028(A) mandates a permanent forfeiture of all post-conviction disability, medical, and other benefits under the Arizona Workers' Compensation Act." *Id.* at n.1, ¶ 1. Our appellate courts were silent on this precise question until *Obregon* was published. Applicants, like Comella, have always been

free to argue that the statute limits forfeiture to the benefits obtained by the fraudulent conduct.

¶12 Finally, unlike the litigant in *Circle K Corp. v. Industrial Commission*, 179 Ariz. 422, 880 P.2d 642 (App. 1993), Comella had a financial incentive to protest the notice of claim status. See *Circle K*, 179 Ariz. at 426-27, 880 P.2d at 646-47 ("[C]ourts hesitate to apply preclusion when, for example, the party against whom preclusion is sought had no incentive to litigate."). Failure to file a request for hearing with the ICA means that the determination by the ICA "is final and res judicata to all parties." A.R.S. § 23-947(B) (2011). Comella could have argued that he should only forfeit a portion of his benefits, based on an interpretation of A.R.S. § 23-1028(A) similar to the one we adopted in *Obregon*. However, because Comella chose not to timely contest the suspension notice, it became final.

III. CONCLUSION

¶13 For the foregoing reasons, we affirm the ALJ's award and findings.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge